LIBRARY
SUPREME COURT

No. 422

Office-Supreme Court, U.S.
FILED
AUG 8 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

VIRGIL O. PLATA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

CHARLES A. BELLOWS
Ten South La Salle Street
Chicago, Illinois 60603
Attorney for Petitioner.

JASON ERNEST BELLOWS
SHERMAN C. MAGIDSON
Chicago, Illinois
On the Brief

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LAkeview 5-6581

INDEX

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented for Review	2
Statement of the Case	2
Reasons for Granting Writ	5
Appendix A—Opinion of the Court of Appeals	App. 1
Appendix B—Judgment Order of the Court of Appeals	App. 9

CITATIONS

Cases

Baltimore & Ohio Railroad Company v. Rambo (6 Cir., 1893), 59 Fed. 75	5, 6
Bell v. Texas, No. 69, October Term, 1966	5
Escobedo v. Illinois, 378 U.S. 478	10
Gordon v. United States, (5th Cir., 1918), 254 Fed. 53	6
Howard v. Texas, No. 6, October Term, 1966	5
Lang v. United States, (7 Cir., 1904), 133 Fed. 201	5
MacKnight v. United States, (1 Cir., 1920), 263 Fed. 832	6
Logan v. United States, 144 U.S. 263	6
Mallory v. United States, 354 U.S. 499	10
McNabb v. United States, 318 U.S. 332	10
Miranda v. Arizona, ... U.S. ..... 86 S.Ct. 1602	10

PAGE

Reed v. Beto, No. 70, October Term, 1966 5

Rosen v. United States, 245 U.S. 467 5

Spencer v. Texas, No. 68, October Term, 1966 5

Williams v. United States (5 Cir., 1918), 254 Fed. 52 .. 6

Williams v. United States (8 Cir., 1924), 3 F.2d 129 6

Statutes

United States:

Canal Zone:

5 Canal Zone Code, Secs. 2731-2966 8

Kansas:

Kan.Stat.Ann., Secs. 60-401 to 60-470 8

Virgin Islands:

5 Virgin Islands Code, Secs. 771-956 8

United Kingdom:

The Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36) 7

Miscellaneous

Griswold, The Long View, 51 Am. Bar Ass'n. J. (Nov. 1965) 1017 9

Ladd, Credibility Tests, Current Trends (1940), 89 U. of Pa. L. Rev. 166 8

Ladd, Techniques and Theory of Character Testimony (1939), 24 Ia. L.Rev. 498 8

McCormick, Handbook of the Law of Evidence, 94 (1954) 9

Model Code of Evidence, Rule 106(3) 8

Uniform Rules of Evidence 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

VIRGIL O. PLATA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled cause on May 31, 1966.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Seventh Circuit, printed in Appendix A hereto, *infra*, p. App. 1, is as yet unreported.

Jurisdiction

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on May 31, 1966. Rehearing was denied on July 8, 1966. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented for Review

1. Whether the petitioner was denied due process of law and a fair trial by virtue of the use by the prosecution for purposes of impeaching the defendant as a witness of evidence that eleven years prior to trial the petitioner had been convicted of the crimes of assault with intent to commit murder and burglary, both felonies.

2. Whether the petitioner had effectively waived his right to the effective assistance of counsel of his own choice during interrogation by agents of the Secret Service where the evidence showed that the petitioner had requested the assistance of counsel and he was permitted to telephone an attorney who could not be reached by telephone and where the Secret Service agents then proceeded with the interrogation during which the petitioner made incriminating statements.

3. Whether a search of the business premises of the petitioner and the seizure therein of certain evidence was unreasonable where the Secret Service agents obtained a consent from the petitioner during the interrogation and under the circumstances referred to in question 2.

Statement of the Case

The petitioner, Virgil O. Plata, was indicted by the October, 1964 Grand Jury of the Northern District of Illinois, Eastern Division for the crimes of possession of counterfeiting plates, possession of counterfeit money, making

counterfeit money and conspiracy to violate the law against counterfeiting. He was tried by a jury in the United States District Court for the Northern District of Illinois, Eastern Division, Honorable William J. Campbell, presiding. The jury returned a verdict finding him guilty as charged in the indictment and the trial court entered sentence of eight years committment to the custody of the Attorney General of the United States.

Prior to trial the petitioner filed a motion to suppress evidence. The testimony taken at that hearing brought out the following facts:

On July 22, 1963, at 11:45 A.M., Special Agents of the United States Secret Service arrested the petitioner at his place of business, the McCaw Printing Company, 701 South LaSalle Street, Chicago, Illinois. The Agents told him that he was under arrest and that anything he said could be used against him. The petitioner asked the reason for the arrest and was told that it was for counterfeiting. He was permitted to make a call. Petitioner was then taken to the offices of the Secret Service in the Federal Building in Chicago, arriving there around noon of that day. Special Agent Hanley asked him if he would submit to a polygraph test and the petitioner responded that he wanted "to do anything I can to co-operate but I would like to talk to a lawyer first." Hanley then tried to contact one Edward Kent, the attorney for petitioner's company. Kent was not in his office and Hanley was told that Kent would be away until later in the afternoon. Thereafter the agents continued to interrogate the petitioner and also requested a consent from him to search the business premises. Hanley then told the petitioner that a search warrant could be obtained to authorize a search of the business premises but that it would take time and implied that petitioner

would be held in custody overnight if it became necessary to procure a search warrant. Hanley further told the petitioner to sign a consent to the search if he wanted to "hurry this up" and get out. At about 1:45 P.M. petitioner signed the consent. The subsequent search produced plates, uncut notes and negatives.

At the trial, the government also introduced testimony that while the petitioner was in custody and being interrogated, he was searched and a slip of paper was found on his person with the name Reidelberger and the telephone number EA 7-7679. The Secret Service Agent who made the search asked the petitioner about the notation and the petitioner responded that the name was of a friend and customer.

According to one Francis Hudson, a witness for the government, one Donald Reidelberger and the witness went to New York and Philadelphia and attempted to pass certain counterfeit five dollar bills, but they were able to pass only about one hundred dollars worth. The government also introduced evidence that at the time Hudson and Reidelberger were in the East, the petitioner told one Leoddris Broughton that his "boy" was going east with the bills and later according to Broughton, the Petitioner told him that his "boy" had not been successful. The government argued that the statement of the petitioner made to the Secret Service Agent about Reidelberger connected him with the attempt to pass money in the east.

Reasons for Granting Writ

1. The first question presented by this petition concerns the propriety of introducing in evidence the prior convictions of the defendant for purposes of impeaching him as a witness. This Court has granted certiorari in at least four cases in which a somewhat similar question has been presented, namely whether it is proper for the prosecution to inform the jury, prior to verdict, of the defendant's prior criminal record for the purpose of enhancing punishment.

The cases now pending are *Howard* v. *Texas,* No. 6, October Term, 1966; *Spencer* v. *Texas,* No. 68, October Term, 1966; *Bell* v. *Texas,* No. 69, October Term, 1966; and *Reed* v. *Beto,* No. 70, October Term, 1966. The content of the questions presented in those cases is reported at 35 Law Week 3008, 3010 and 3011.

The Court of Appeals in this case stated in its opinion that it had "sympathy with the argument but, even so, we do not feel disposed to abruptly strike down a rule so long embedded in the law." This rule, in actuality has not been so long embedded as the Court of Appeals thought. It was not until *Rosen* v. *United States,* 245 U.S. 467, decided in 1918, that an opinion of this Court removed the disability from giving testimony of persons convicted of felonies, although the lower courts had permitted convicted felons to testify prior to that case. See e.g. *Lang* v. *United States* (7 Cir., 1904), 133 Fed. 201; *Baltimore & Ohio Railroad Company* v. *Rambo* (6 Cir., 1893), 59 Fed. 75.

It was only with the removal of the testimonial disability of convicted felons that the rule was developed permitting

evidence of the conviction to be introduced to affect credibility. Then Judge William Howard Taft of the Sixth Circuit reasoned:

> Of course, the question whether a conviction of a felony was competent at common law to impeach the credibility of a witness could not arise, because the witness was absolutely disqualified. When this disqualification is removed, however, it would seem to follow that, as the conviction of a less crime than a felony had always been competent in impeachment, the conviction of a felony would, *a fortiori,* be relevant for the same purpose. (*Baltimore & Ohio Railroad Company* v. *Rambo* (6 Cir., 1893), 59 Fed. 75, 79)

Other Federal Courts also restated the rule although doing so with general lack of citation of authority or even without resort to such logic as that of Judge Taft. Among such cases are *Williams* v. *United States* (5 Cir., 1918), 254 Fed. 52; *Gordon* v. *United States* (5 Cir., 1918), 254 Fed. 53; *MacKnight* v. *United States* (1 Cir., 1920), 263 Fed. 832. In *Williams* v. *United States* (8 Cir., 1924), 3 F.2d 129, the court accepted, practically without comment, the proposition that a prior conviction of felony could be shown for the purpose of impeaching the credibility of the witness, but, the court was most concerned with the question of whether such prior conviction could be brought out by cross examination of the witness or by certified copy of the conviction.

Interestingly enough, in the only case in which the question of whether a prior conviction of felony was admssible to effect the credibility of the witness has come before this court, the court refused to pass on the question because it had been answered favorably to the party propounding it in the lower court. *Logan* v. *United States,* 144 U.S. 263.

Although the United States has taken the course, since the disqualification of the convicted felon has been removed, to permit evidence of that conviction to be shown to the trier of fact for the purpose of impeaching the credibility of the witness, other jurisdictions, notably England, have not permitted such evidence to be shown in the case of the witness who was also the accused in a criminal case. The Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36) provides:

> Every person charged with an offense * * * shall be a competent witness for the defense at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows:—
>
> * * *
>
> (f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—
>
> (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or
>
> (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the charcter of the prosecutor or the witnesses for the prosecution; or
>
> (iii) he has given evidence against any other person charged with the same offence:

Movements to abolish the rule, prevalent in the United States, permitting impeachment by proof of prior convic-

tion have been in existence for at least the past quarter century. See: Ladd, Techniques and Theory of Character Testimony (1939), 24 Ia. L. Rev. 498; and Ladd, Credibility Tests, Current Trends (1940) 89 U. of Pa. L. Rev. 166. In 1942, the American Law Institute adopted the Model Code of Evidence Rule, 106 (3) of which provides:

> If an accused who testifies at the trial introduces no evidence for the sole purpose of supporting his credibility, no evidence concerning his omission or conviction of crime shall, for the sole purpose of impairing his credibility, be elicited on his cross-examination or be otherwise introduced against him. . . .

In 1953, the National Conference of Commissioners on Uniform State Laws and the American Bar Association approved the Uniform Rules of Evidence which were based in great part upon the model code. Rule 21 of the Uniform Rules of Evidence provides:

> Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility. If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility.

Although the Model Code of Evidence has never been adopted, the Uniform Rules of Evidence have been enacted into law in one State, Kansas, (Kan. Stat. Ann. Secs. 60—401 to 60—470) the Canal Zone, (5 Canal Zone Code Secs. 2731-2966) and the Virgin Islands (5 Virgin Islands Code Secs. 771-956.) Pennsylvania has also enacted legislation by

which "the accused who takes the stand is shielded, under certain circumstances, from injury or proof as to misconduct or conviction of crime when offered to impeach." McCormick, Handbook of the Law of Evidence, 94 (1954) citing Act of July 3, 1947, P. L. 1239 (Amending Act of March 15, 1911).

Perhaps the best argument against the introduction of a prior criminal record against a defendant for purposes of affecting his credibility as a witness was made by Dean Erwin N. Griswold in a recent article in the American Bar Association Journal, (Griswold, The Long View, 51 Am. Bar Ass'n. J. (Nov. 1965) 1017, 1021).

> The man with a prior criminal record in this country is far more at the mercy of the authorities—police and judicial—than seems to me to be warranted. He may have learned his lesson and have gone straight as an arrow since his release. But he is an immediate suspect for future arrest. And if he is arrested and put on trial, he has two almost hopeless alternatives in many states. He can take the stand and deny his participation in the crime now charged. If he does this, his prior conviction can often be shown to impeach his testimony, in which case he is very likely to be convicted. Or he can refuse to take the stand, resting on his constitutional privilege, in which case he is also very likely to be convicted. Ought we not, even with persons who have once offended against society, undertake to develop procedures which will seek as far as possible to bring out the truth about the crime now charged, not some prior crime?
>
> We accept much self-deception on this. We say that the evidence of the prior convictions is admissible only to impeach the defendant's testimony, and not as evidence of the prior crimes themselves. Juries are solemnly instructed to this effect. Is there anyone who doubts what the effect of this evidence in fact

is on the jury? If we know so clearly what we are actually doing, why do we pretend that we are not doing what we clearly are doing? This problem was discussed ably by Dean Wigmore many years ago. Yet very little has been done about it. Here again I fear that the states have yielded to inertia. It is such inertia that eventually leads to federal intervention. There is a good way for the states to avoid this intervention, and that is to take action themselves.

In Pennsylvania some progress has been made on this question. And the Uniform Rules of Evidence, less broadly, provide that if the accused does not offer evidence to support his own credibility, the prosecution will not be allowed to prove past criminal acts, arrests or convictions to impeach the defendant as a witness. It is time that the states took action here to provide a rule which, in the words of Professor McCormick, furnishes a "more just, humane, and expedient solution than the prevailing practice."

We submit that the time is now ripe for this court, in the exercise of its supervisory powers, to consider the question which it passed over three-quarters of a century ago and rule that the prior conviction of a defendant may not be introduced in evidence for the purpose of impeaching his credibility as witness.

2. & 3. The second and third points raised by this petition are further off-shoots of the cases of *Escobedo* v. *Illinois*, 378 U.S. 478 and *Miranda* v. *Arizona*, ... U.S. ....., 86 S.Ct. 1602. We need not inform the court how important those cases are. They will be discussed by those interested in the administration of the criminal law for decades to come. The questions presented to this court by this case are, we submit, no less important. The case presents aspects of not only *Escobedo* and *Miranda* but also *McNabb* v. *United States*, 318 U.S. 332 and *Mallory* v. *United States*, 354 U.S. 499.

Simply stated, we have in this case a situation in which the petitioner was arrested during the late morning hours of a business day in the City of Chicago, where a United States Commissioner, ten District Judges and seven Circuit Judges are generally in attendance in their respective courts. The petitioner was not taken before a commissioner or judge when he was placed under arrest but was taken to the offices of the Secret Service. He tried to call his lawyer, but the lawyer was out of the office. He was searched. He was interrogated about items which were disclosed by the search and made incriminating statements. He was informed by agents of the Secret Service that unless he consented to a search by the agents of his business premises, he would be kept in custody for a presumably lengthy period of time. The incarceration, the refusal of the secret service agents to refrain from their interrogation while he waited for his lawyer to communicate with him and their refusal to forbear from pressing him for consent to search while he waited for his lawyer to communicate with him, denied to him the right to effective assistance of counsel under *Escobedo*, and his right to be taken before a commissioner without unnecessary delay, and thus evidence obtained in default of these obligations should be excluded under *McNabb* and *Mallory*.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES A. BELLOWS,
Chicago, Illinois
Attorney for Petitioner.

APPENDIX

APPENDIX A

Opinion of the Court of Appeals

Before HASTINGS, *Chief Judge,* KILEY and MAJOR, *Circuit Judges.*

MAJOR, *Circuit Judge.* Appellant, Virgil O. Plata, was tried by a jury and found guilty on four counts of an indictment. Count 1 charged that he had in his possession certain plates bearing the impression of a $5.00 Federal Reserve Note with intent to use them in forging and counterfeiting $5.00 Federal Reserve Notes; Count 2, that he made counterfeit $5.00 Federal Reserve Notes; Count 3, that he had in his possession counterfeit Federal Reserve Notes, and Count 5, that he, Francis Hudson and Donald Reidelberger conspired to commit the offenses of making, forging and passing counterfeit Federal Reserve Notes and had unlawfully in their possession plates in the similitude of those from which had been printed the Federal Reserve Notes described in the indictment.

Motions for judgments of acquittal were appropriately made and denied. Defendant's motion for new trial and that in arrest of judgment were overruled by the Court, and defendant was sentenced to the custody of the Attorney General for a term of eight years, under Title 18 U.S.C.A. Sec. 4208 (a)(2). From the judgment thus entered the appeal comes to this Court.

Other than the contention that the proof was not sufficient to sustain the judgment, the errors urged as grounds for reversal all relate in one form or another to the claimed erroneous and prejudicial admission of evidence. These contentions embrace the following: (1) that defendant's place of business was searched by govern-

ment agents without a search warrant, in violation of his constitutional right under the Fourth Amendment, and evidence obtained thereby erroneously admitted against him; (2) that an alleged incriminatory statement, obtained from defendant by a Secret Service agent while defendant was without the assistance of counsel, in violation of defendant's constitutional right under the Sixth Amendment, was improperly admitted against him; (3) that testimony of the witness Hudson concerning conversations and activities which took place between him and Reidelberger was erroneously admitted for the reason that the proof was not sufficient to show defendant had engaged in a conspiracy with those two parties; (4) that the Court erred in admitting proof of a felony conviction which took place eleven years prior to the return of the instant indictment, and (5) that the Court erred in permitting the government in rebuttal to introduce alleged prejudicial testimony which, if material, should have been introduced during its main presentation.

The issue as to the legality of the search of defendant's premises and the seizure of property found therein, subsequently admitted against him at the trial, was appropriately raised in advance of trial by defendant's petition to suppress. At a hearing thereon, the government sought to justify the search on the basis of a written consent signed by defendant. Defendant admits the signing of the consent but contends that he did so by reason of duress or coercion. Thus, the factual issue before the Court was whether the consent was voluntary, as asserted by the government, or involuntary, as claimed by defendant.

We think a brief statement of the evidence heard at the hearing on the motion to suppress will suffice. On July 22, 1963, at approximately 11:45 a.m., defendant was

arrested by Secret Service agents at the McCaw Printing Company, a printing establishment in which defendant and James Cronk were partners. He was taken to the office of John Hanley, Chief of the Secret Service, in the Federal Court Building in Chicago, where he was interrogated by Hanley and other agents. He was told that he was under arrest for counterfeiting and that any statement made could be used against him. Hanley asked defendant if he would submit to a polygraph, to which he responded that he wanted to cooperate but that he would like to talk to a lawyer. Hanley attempted on two occasions to telephone the lawyer suggested by defendant but was unable to reach him. Defendant was asked if he was willing to sign a consent to the search and thus save the time and trouble of obtaining a search warrant. He replied, "Yes, you can search my house, my car and everything." He then read and signed the written consent prepared by an agent. At the time, he admitted he had been advised of his constitutional rights.

At the time of signing, defendant had been held for less than two hours, during which he was photographed, fingerprinted, fed and questioned. There was no proof and it is not contended that during the period of the interrogation he was harassed, and there is no reasonable basis for an inference that he gave his consent because of coercion or intimidation. His own testimony shows that he gave his consent for personal reasons, with the expectation that a search of his premises would do him no harm. In response to the question, "What was the reason behind your signing that paper?" he answered, "The main reason was that I wanted to get back to the office. I wanted to get out of custody. I felt that no search of my premises would produce any evidence and that I was willing to sign the paper and wanted to get out at the office."

The Court in denying defendant's motion to suppress stated, "All of the circumstances in evidence here today, in my opinion, clearly point to the voluntary nature of the consent that this defendant has given. * * * I base my conclusion that it is entirely on the testimony of the defendant himself who appears in support of his own petition."

We agree with the conclusion of the Court that defendant voluntarily gave his consent to the search of his premises. It follows that his petition to suppress was properly denied and that the evidence obtained as a result of the search was not erroneously admitted.

Defendant's second ground urged for reversal relates to the alleged erroneous admission in evidence of a single statement made by defendant during the period he was under arrest. While in custody his person was searched by a specilal agent and numerous cards were found in his pocket. One card bore the notation, "Reidelberger, EA 7-7679." In response to the agent's inquiry as to who this person was, defendant said, "Friend and customer." It is pertinent to note that the petition to suppress heretofore discussed related only to the evidence obtained as a result of the search of defendant's premises and did not include any evidence obtained from defendant's person or any statement which he made relative thereto. In fact, it is not now suggested that the search of defendant's person was tainted with any illegality. He argues only that his statement of explanation concerning the name "Reidelberger" was obtained in violation of his constitutional right to counsel. As will be subsequently disclosed, this bit of alleged incriminating evidence was a circumstance relied upon by the government in support of the conspiracy count.

We need not extend our discussion on this point because we think it is without merit. As previously shown, defendant had been advised of his constitutional rights, and particularly that any statement he made might be used against him. It is true he had stated that he desired to consult the lawyer who had represented him in business, and admittedly two unsuccessful attempts had been made to reach him by telephone. No request was made that any other lawyer be contacted. We think the inference is inescapable that defendant, with knowledge of his right to counsel and to remain silent if he so desired, voluntarily responded to the agent's inquiry. Defendant's reliance upon *Escobedo* v. *Illinois*, 378 U.S. 478, is badly misplaced. The circumstances in that case which resulted in a confession to the crime of murder are far removed from those here where the alleged incriminating statement merely identified a person whose name appeared on a card carried by defendant.

Defendant argues that testimony of the witness Hudson, wherein he related conversations between him and Reidelberger and gave a narrative of their activities, was erroneously admitted. There was no proof that defendant had any conversation with either of these parties or directly had any transactions with them. The propriety of the admission of this testimony was dependent upon whether there was proof by the government of a conspiracy, as alleged in Count 5. The parties are in agreement that the existence of a conspiracy and the defendant's participation in it must be established before any evidence of conversation of co-conspirators outside his presence are admissible against him. It is hardly open to question but that a conspiracy in which defendant was a participant was shown. As the government states in its brief, "The sole question for determination then is whether

Reidelberger and Hudson were members of that conspiracy with the defendant."

Broughton, an employee of defendant, although not charged as a co-conspirator in Count 5, was the main witness relied upon by the government to prove that defendant and others were engaged in a conspiracy. Briefly, the witness testified that in April 1963, defendant stated that his "boy" was going to pass the counterfeit bills, that his "boy" was going out east to do so, and that defendant subsequently told him that his "boy" had been out of town to pass the bills and had not been successful. This testimony, buttressed by other circumstances in proof, was sufficient to show that defendant, Broughton and others were engaged in a conspiracy.

The government relies upon circumstantial evidence in support of its theory that Hudson and Reidelberger were shown to be members thereof. It points out that Hudson and Reidelberger went to New York and other east coast cities in possession of a large quantity of counterfeit $5.00 Federal Reserve Notes in April 1963, the time when defendant stated that his "boy" was going east to pass counterfeit bills; that after approximately two weeks and at the time defendant was discussing the failure of the trip of his "boy," Hudson and Reidelberger returned to Chicago, having passed a very few of the counterfeit bills.

The government points to proof that defendant at the time of his arrest had in his possession, as heretofore discussed, a card bearing the inscription, "Reidelberger," with a telephone number, who, he admitted to an agent was a "Friend and customer." There was evidence that Reidelberger and Hudson drove to within a block of defendant's place of business and that while in this area Reidelberger parked his car, was gone for approximately

twenty minutes and returned with counterfeit money, a large quantity of which was delivered to Hudson. The latter after his arrest furnished the Secret Service with information as to where a quantity of this money was hidden, which was recovered. It was stipulated that the money thus recovered was identical with that found at defendant's place of business and was, in fact, printed on plates discovered there in connection with the search previously discussed.

Thus, this stipulated evidence appears to connect Hudson and Reidelberger with defendant in a joint venture of making and disposing of counterfeit money. At any rate, it raises a strong inference that the counterfeit money which Reidelberger and Hudson had in their possession and sought unsuccessfully to dispose of not only was obtained from defendant's place of business but was made there. We agree with the trial Court that the testimony of Hudson was properly admitted on the basis that they were all involved in a conspiracy as charged.

No good purpose could be served in discussing defendant's contention that the Court erred in permitting the impeachment of defendant by showing that he had been convicted of a felony eleven years previously. On numerous occasions we have heard the argument that such evidence is unfair to a defendant and in some cases works a great hardship. We have sympathy with the argument but, even so, we do not feel disposed to abruptly strike down a rule so long embedded in the law.

Defendant's contention that the Court erred in permitting the government to introduce rebuttal evidence as to a conversation between defendant and the witness Broughton has little, if any, merit. Defendant both during direct and cross-examination denied all connection with

the government's witness Broughton in the counterfeiting operation. On cross-examination he was asked if he had requested Broughton to take the blame for the counterfeiting charge and if he had promised to take care of Broughton's family in return. Defendant denied such a conversation, and in rebuttal the government recalled Broughton who testified that such a conversation was had while both were in the Federal jail. While we think this evidence might properly have been offered by the government in chief, we also see no impropriety under the circumstances in its admission in rebuttal. It was a matter largely in the discretion of the Court. *United States* v. *Crowe,* 188 F.2d 209, 213; *Johnson* v. *United States,* 207 F.2d 314, 322.

Finally, defendant argues, with force and we think sincerity, that a consideration of the evidence even in the light most favorable to the government leaves a serious doubt as to his guilt. This argument consists in the main of an attack upon the veracity of the government witness Broughton who entered a guilty plea, with imposition of sentence deferred until after he had testified for the government in the instant case. A reading of his testimony reveals that much of the criticism directed at him is justified. On the other hand, there are circumstances in proof which tend to corroborate vital portions of his testimony. A careful review of the record leads us to the conclusion that the case was properly submitted to the jury for an evaluation and resolution of the conflicting testimony. In this connection it is pertinent to note that no question is raised here but that the jury was properly instructed as to its function in the case. We hold that the Court's judgment based on the verdict of the jury must stand.

The judgment appealed from is

AFFIRMED.

APPENDIX B

Judgment Order of the Court of Appeals

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this court filed this day.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 422

VIRGIL O. PLATA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted by a jury, in the United States District Court for the Northern District of Illinois, of violating the federal counterfeiting statutes and was sentenced to eight years' imprisonment. The court of appeals affirmed (Pet. App. A; 361 F. 2d 958).

1. Petitioner's primary contention is that this Court should overrule the settled doctrine that when the defendant takes the stand his credibility may be

impeached by proof of a prior criminal conviction, regardless of whether he has affirmatively placed his character in issue. See, *e.g.*, *United States* v. *Comi*, 336 F. 2d 856, 861 (C.A. 4), certiorari denied, 379 U.S. 992; *Schwab* v. *United States*, 327 F. 2d 11, 17 (C.A. 8); *Taylor* v. *United States*, 279 F. 2d 10, 12 (C.A. 5); *United States* v. *Howell*, 240 F. 2d 149, 158 (C.A. 3). Certainly, there is no occasion to re-examine that principle in this case.

Here, petitioner clearly put his character in issue as part of his defense. He called five character witnesses, who had known him from five to sixteen years and testified that he had a good reputation for honesty and integrity (A. 50-51).[1] None of the authorities relied on by petitioner suggest that, in these circumstances, impeachment by prior convictions is improper. See *Michelson* v. *United States*, 335 U.S. 469. Moreover, petitioner did not advance his present contention in the trial court. His sole objection was that, since probation is not a "record of finality", the conviction on which he was sentenced to probation[2] is not a "provable record" (A. 51-53).

The rule applied here is quite different, both in application and in effect, from the rule, involved in four

---

[1] "A." refers to the appendix to petitioner's brief in the court of appeals, "Tr." refers to the transcript of the trial and "S. Tr." refers to the transcript of the hearing on petitioner's motion to suppress.

[2] Petitioner was convicted in 1954, on his plea of guilty, to burglary and assault with intent to commit murder and was sentenced to six months' imprisonment and five years' probation.

cases awaiting argument in this Court,[3] that the jury may be informed of prior convictions in habitual offender cases. See *Lane* v. *Warden*, 320 F. 2d 179, 186 (C.A. 4). As this Court stated in *Michelson*, *supra*, at 479, "while the law gives defendant the option to show as a fact that his reputation reflects a life and habit incompatible with commission of the offense charged, it subjects his proofs to tests of credibility designed to prevent him from profiting by a mere parade of partisans."

2. At trial, a federal agent testified that, while in custody, petitioner identified the name "Reidelberger" written on a card in petitioner's possession as that of a "friend and customer" (A. 26);[4] also, counterfeiting paraphernalia discovered in a search of petitioner's place of business were introduced in evidence. Petitioner's contention (Pet. 10-11) that this statement and these materials were inadmissible is, as the courts below held, without merit.

Petitioner was arrested at his place of business at approximately 11:45 a.m. by Secret Service agents and brought to the Secret Service office. He was advised that he was arrested for counterfeiting, that any statement he made could be used against him and that he was entitled to counsel (A. 12, 15, 62-63). After petitioner asked to speak with his company's lawyer, the agents twice telephoned the lawyer but

---

[3] *Howard* v. *Texas*, No. 6; *Spencer* v. *Texas*, No. 68; *Bell* v. *Texas*, No. 69; *Reed* v. *Beto*, No. 70.

[4] Other testimony connected petitioner with Reidelberger in the passing of counterfeit money.

were unable to reach him (Tr. 20-21). At about 2:00 p.m., petitioner was asked whether he was willing to sign a consent to a search of his printing shop in order to save the trouble of obtaining a search warrant. He agreed, saying: "Yes, you can search my house, my car and everything" (S. Tr. 42). At the hearing on a motion to suppress, petitioner said that he consented to the search because he believed that such a search would produce no evidence and he wanted to get out of custody (S. Tr. 12-13).

The courts below properly held that petitioner's consent to the search of his office was given voluntarily. As the trial court observed, petitioner's own testimony indicated "that he at that time was making a serious effort to convince the agents that he was fully cooperating with their investigation and that he knew what he was doing" (S. Tr. 67-68).

Petitioner's claim that his consent was invalid and his statement about Reidelberger was inadmissible because he did not have the assistance of counsel was properly rejected. Unlike the situation in *Escobedo* v. *Illinois*, 378 U.S. 478, where there was no warning as to the right to remain silent and the defendant's request to see his attorney was denied, petitioner was fully apprised of his rights and a good faith effort was made on two occasions to obtain the particular attorney whom petitioner had requested. There is no claim that petitioner's actions were not otherwise voluntary. Since this case was tried before the decision in *Miranda* v. *Arizona*, 384 U.S. 436, its guidelines

are inapplicable. See *Johnson* v. *New Jersey*, 384 U.S. 719.[5]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

SEPTEMBER 1966.

[5] Petitioner's suggestion (Pet. 10-11) that the rule in *Mallory* v. *United States*, 354 U.S. 449, was violated in this case comes too late. See *United States* v. *Indiviglio*, 352 F.2d 276 (C.A. 2), certiorari denied, 383 U.S. 907. Since he did not raise this objection in the trial court (see A. 25; Tr. 153-155, 164) the facts relevant to a determination of this question do not appear in the record. Moreover, even if the court had erred in admitting petitioner's brief remark that Reidelberger was a "friend and customer," the error was *de minimis*.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 230180 176